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SAINT LOUIS, JUNE 14, 1878.

CURRENT TOPICS.

In *Brown v. Pyle*, 5 W. N. 394, recently decided by the Supreme Court of Pennsylvania, a father had agreed to pay his son a specific sum for work to be done during his minority; but no note was given, nor was any written agreement made between them. Sixteen years afterwards the father, when insolvent, gave his son his judgment note, payable on demand, in payment of his son's services. To the fund arising from a sheriff's sale of the personal property of the father upon execution under this judgment, the father's creditors contested the son's claim, averring that it was a fraud upon their rights, and therefore void. The court held (reversing the decree of the court below), that the judgment was valid, and that the preference was not a fraud upon the creditors, the consideration being honest and the debt justly due. That a father may so manumit his son as to authorize him to contract with an employer, and receive his earnings to his own use, is well established. Galbraith v. Black, 4 S. & R. 407; United States v. Mertz, 2 Watts, 406. He may do this although he be insolvent. Holdship v. Patterson, 7 id. 547. Although he be legally entitled to the wages of his minor son, he is not bound to claim them for the benefit of his creditors. McCloskey v. Cyphert, 3 Casey, 220. In this last case, it was said by Mr. Justice BLACK: "This emancipation of the son from the father's control may be as perfect when they both live together under the same roof as if they were separated. The father's renunciation of all legal right to the son's labor is not the less absolute because other family ties continue unbroken." He may so relinquish his right to the services of his minor son that he can not reassert that right, either against the son or other persons. Torrens v. Campbell, 24 P. F. S. 470. If the consideration in this case was honest, and the debt justly due, it was no fraud on the other creditors to thus prefer the son, except as against a bankrupt law. A debtor may prefer one creditor to another, and such preference is not fraudulent either in law or in fact. Uhler v. Maulfair, 11 Harris, 481; Hart v. Covanhovan, 9 id. 495; Hopkins v. Beebe, 2 Casey, 85. A debtor may even prefer a *bona fide* creditor by a confession of judgment, although the claim were not enforceable at law. Keen v. Kleckner, 6 Wright, 529.

The Supreme Court of the United States in *re Jackson*, have just delivered an important opinion concerning the postal laws of the United States. Section 3,894, of the Revised Statutes as amended, provides that "No letter or circular concerning lotteries, so-called gift-concerts, or other similar enterprises offering prizes, or concerning schemes devised and intended to deceive and defraud the public for the purpose of obtaining money under false pretenses, shall be carried in the mail;" and that "any person who shall knowingly deposit or send anything to be conveyed by mail in violation of this section, shall be punishable by a fine of not more than five hundred dollars nor less than one hundred dollars, with costs of prosecution." The petitioner was indicted under this law in the Circuit Court of the United States for the Southern District of New York, for unlawfully depositing in the United States mail, to be conveyed by it, a circular concerning a lottery prize enterprize enclosed in an envelope addressed to another person. He was convicted and sentenced to a fine of $100. He thereupon appealed to the Supreme Court for a *habeas corpus* on the ground of the unconstitutionality of the act under which he was convicted. This the Supreme Court refused, holding as follows: 1. The power vested in Congress to establish "post-offices and post-roads" embraces the regulation of the entire postal system of the country. Under it Congress may designate what shall be carried in the mail, and what shall be excluded. 2. In the enforcement of regulations excluding matter from the mail, a distinction is to be made between different kinds of mail matter; between what is intended to be kept free from inspection, such as letters and sealed packages subject to letter postage; and what is open to inspection, such as newspapers, magazines, pamphlets, and other printed matter, purposely left in a

condition to be examined. 3. Letters and sealed packages subject to letter postage in the mail can only be opened and examined under like warrant, issued upon similar oath or affirmation, particularly describing the thing to be seized, as is required when papers are subjected to search in one's own household. The constitutional guaranty of the right of the people to be secure in their papers against unreasonable searches and seizures extends to their papers, thus closed against inspection, wherever they may be 4. Regulations against the transportation in the mail of printed matter, which is open to examination, can not be enforced so as to interfere in any manner with the freedom of the press. Liberty of circulating is essential to that freedom. When, therefore, printed matter is excluded from the mail, its transportation in any other way can not be forbidden by Congress. 5. Regulations excluding matter from the mail may be enforced through the courts, upon competent evidence of their violation obtained in other ways than by the unlawful inspection of letters and sealed packages; and with respect to objectionable printed matter, open to examintion, they may in some cases also be enforced by the direct action of the officers of the postal service upon their own inspection, as where the object is exposed and shows unmistakably that it is prohibited, as in the case of an obscene picture or print.

The act of Congress, of July 17, 1872, § 2, (12 Stat. 592; Rev. Stat. 711, § 3583) declares that "no private corporation, banking association, firm or individual shall make, issue, circulate, or pay out any note, check, memorandum, token or other obligation, *for a less sum than one dollar*, intended to circulate as money, or to be received or used in lieu of the lawful money of the United States," under a penalty of fine or imprisonment, or both. In *United States v. Van Auken*, decided by the Supreme Court of the United States during its present term, the defendant was indicted under this act for circulating an instrument in the following words: "The Bangor Furnace Company will pay the bearer on demand fifty cents in goods at their store in Bangor, Mich." The court held that the instrument not being payable in legal money, was not within the statute. "The solution of the question," said the court, "depends on the construction of the words 'for a less sum than one dollar.' The object of the provision was obviously to secure as far as possible the field for the circulation of stamps, as provided in the preceding section, without competition from any quarter. This currency was superseded by the fractional notes authorized to be issued by the act of March 3, 1863, § 4, 12 Stat. 711. Small notes payable in any specific articles, if issued, could have only a neighborhood circulation, and but a limited one there. It could be but little in the way of the stamps or small notes issued for the purposes of circulating change by the United States. Congress could, therefore, have had little or no motive to interfere with respect to the former. This must be borne in mind in the examination of the question in hand. A dollar is the unit of our currency. It always means money, or what is regarded as money. In this case the statute makes it the standard of measure with reference to the forbidden notes and obligations. If one of them be for a larger 'sum than one dollar,' it is not within the prohibition and is not affected by the law. It is a fair, if not a necessary inference, that the standard of measurement named was intended to be applied only to things *ejusdem generis*, in other words, to notes for money and to nothing else. It is certainly inapplicable to any thing not measurable by the pecuniary standard. It could not be applied where the measurement was to be *ex gratia*, by the pound, the gallon, the yard, or any other standard than money. This view is supported by the statutory requirement that the forbidden thing must be 'intended to circulate as money, or to be received or used *in lieu of the lawful money of the United States.*' One of the lexical definitions of the word 'sum,' and the sense in which it is most commonly used, is '*money.*' 'Sum. (2) A quantity of money or currency; any amount indefinitely, as a sum of money, a small sum, or a large sum.'—Webster's Dic. 'For a less sum than one dollar,' means exactly the same thing as, for a less sum of money than one dollar. In the former case there is an ellipsis. In the latter it is supplied. The implication where the omission occurs is as clear and effectual as the expression where the latter is added. The grammatical

construction and the obvious meaning are the same. The statute makes the offense to consist of two ingredients: (1) The token or obligation must be for a less sum than a dollar. (2) It must be intended to circulate as money, or in lieu of the money of the United States. Here the note is for 'goods,' to be paid at the store of the Furnace Company. It is not payable in money, but *in goods*, and in goods only. No money could be demanded upon it. It is not solvable in that medium. Watson v. McNairy, 1 Bibb, 356. The sum of 'fifty cents' is named, but merely as the limit of the value in goods demandable and to be paid upon the presentment of the note. Its mention was for no other purpose and has no other effect. In the view of the law the note is as if it called for so many pounds, yards, or quarts of a specific article. The limit of value, there being none other, gave the holder a range of choice as to the articles to be received in payment—limited only by the contents of the store."

CONSECUTIVE TRIALS FOR THE SAME OFFENSE.—II.

The cases we have just been considering hinge upon the identity of offenses so far as concerns their subjective scope. We now approach an interesting line of cases where the dispute is, not as to the nature of the offense, considered by itself, but as to whether the variation of the object, or the grouping of two objects together, constitutes divisibility in the offense. If A, for instance, in shooting at B, kills both B and C, is his conviction under an indictment for killing B a bar to a prosecution against him for killing C? In answering this question let us remember that to join the killing of B and C in the same count would be a duplicity that would not be tolerated; and that if joined in the same indictment in separate counts, the court would compel an election between the offenses. It would be necessary, therefore, to prosecute the cases separately; and if so, it is hard to see how a conviction or acquittal of the one could bar a prosecution of the other. To the indictment for killing B, for instance, A might set up self-defense and be acquitted; but this might be plausibly argued to be an issue different from that which would be presented on his trial for killing C, should it appear that the killing of C was an unprovoked or negligent act. An acquittal or conviction, therefore, of killing B, ought not, on principle, to bar a subsequent indictment for killing C, though the killings were by the same blow.[23]

A similar question arises in larceny. Thus when several articles belonging to the same owner are stolen by the same person simultaneously, they may be grouped in the same count, and a conviction or acquittal on such count, or on any divisible allegation thereof, bars a future indictment for the stealing of the articles enumerated in the count.[24]

But as the better opinion is that there can be no joinder of larcenies of distinct articles belonging to different owners,[25] it follows that a conviction or an acquittal for stealing or feloniously receiving the goods of B, does not bar a prosecution for stealing or receiving the goods of C, though the acts were simultaneous. Indeed, though the offenses were nominally the same, they may be substantially different, since one article may be taken under a claim of right, and the other with felonious intent, the only point in common being concurrence in time in the taking.[26]

Another reason for the conclusion just given is that if, in those jurisdictions which hold the joinder of articles belonging to different owners to be duplicity, we should refuse a subsequent indictment for goods stolen from an owner different from the owner named in the first indictment, we would deprive the

(23) See R. v. Champneys, 2 M.& R. 26; R. v. Jennings, R. & R. 368; State v. Damon, 2 Tyler, 390; State v. R. 338; State v. Fife, 1 Bailey, 1; State v. Fayetteville, Benham, 7 Conn. 414; People v. Warren, 1 Parker C. 2 Murphy, 371; State v. Standifer, 5 Port. 523; Vaughan v. Com. 2 Va. Cas. 273; Smith v. Com. 7 Grat. 593; See, however, State v. Womack, 7 Cold. 508. And as disputing the text, see Clem v. State, 42 Ind. 420. See, also, Whart. on Hom. §§ 28-48. for a discussion of whether grade in all cases of double killing is identical.

(24) R. v. Caison, R. & R. 303; Furneaux's case, R. & R. 335; State v. Cameron, 40 Vt. 555; Com. v. Williams, 2 Cush. 583; Com. v. O'Connell, 12 Allen, 451; Com. v. Eastman, 2 Gray, 76; Jackson v. State, 14 Ind. 327; State v. Williams, 10 Humph. 101; Torton v. State, 7 Mo. 55; People v. Wiley. 3 Hill (N. Y.) 194; though see 1 Hale, 241; R. v. Brettiel, C. & M. 609; Com. v. Sutherland, 109 Mass. 342; State v. Thurston, 2 McMul. 382.

(25) State v. Newton, 42 Vt. 537; Com. v. Andrews, 2 Mass. 409; State v. Thurston, 2 McMullen, 382; though see Com. v. Williams, Thatcher's C. C. 722; State v. Nelson, 29 Me. 329; Ben v. State, 22 Ala. 9; Com v. Dobbin, 2 Pars. 380; Lorton v. State, 7 Mo. 55.

(26) R. v. Knight, L. & C. 378; 9 Cox C. C. 439; Com. v. Andrews, 2 Mass. 409; State v. Thurston, 2 McMul. 382; People v. Warren, 1 Parker, C. R. 338.

owner in the second case of his right to a restoration of the goods by sentence of court, when it might be that he had no notice of the first prosecution.

An apparent exception to the rule before us exists in cases of assaults and batteries, in which it is conceded that if there be a battery on several persons by one blow, a conviction or acquittal for a battery on one of these persons bars a subsequent prosecution for a battery on the other. And the reason of this is plain. It is agreed on all sides that a count charging a battery on A, B and C is good. Such being the case, if the prosecution neglects to make such a joinder, it is properly precluded from further proceedings based on the same blow. It would be an undue vexation of the defendant to permit him to be thus oppressed.

To the doctrine thus stated another qualification has been proposed. Suppose the prosecution could have, if it chose, prosecuted the offenses in a single count, (e. g., assault and assault with intent to wound) but did not do so, yet on a count for assault put the aggravated offence in evidence, and obtained a conviction on the aggravated case, and a sentence accordingly. Can a second indictment be maintained for the aggravated offense? The answer must be in the negative, since the prosecution cannot take advantage of its own negligence in the imperfect presentation of its case, and since the defendant has been tried and convicted on the basis of the aggravated offense.[27]

Should the defendant be acquitted on the first trial, the whole case of the second being before the jury, then as he has been acquitted of what is an essential ingredient in the second case, the second case cannot proceed.

FRANCIS WHARTON.

(27) R. v. Elrington, 9 Cox C. C. 86, 1 B. & S. 689; 10 W. R. 13; citing R. v. Stanton, 5 Cox C. C. 324; Thompson, *in re*, 9 W. R. 203; see State v. Smith, 43 Vt. 324; State v. Stanley, 4 Jones L. (N. C.) 290. The English rulings above cited, however, took place under a statute providing that after a trial by justices there shall be no further proceedings civil or criminal, "for the same cause."

WILLIAM F. ALLEN, an Associate Justice of the New York Court of Appeals, died at his home in Oswego, in that state, on the 3d inst. He was admitted to the bar in 1829, appointed United States District Attorney in 1845, elected to the Supreme Court of the state in 1848 and 1856, and to the Court of Appeals in 1870.

ROBBERY EN ROUTE—VENUE.

MARGERUM AND SEYMOUR v. STATE OF TENNESSEE.

Supreme Court of Tennessee, April Term, 1878.

HON. JAMES W. DEADERICK, Chief Justice.
" ROBT. MCFARLAND,
" PETER TURNEY,
" J. L. T. SNEED,
" T. J. FREEMAN,
} Associate Justices.

The defendants having committed a robbery in Fayette county while traveling to Shelby county as prisoners in charge of an officer, and the property having been recovered from them in the latter county; *Held*, that they were lawfully indicted and tried in the latter county.

S. B. Horrigan, for plaintiff in error; Attorney-General *Heiskell*, for the state.

FREEMAN, J., delivered the opinion of the court.

The only question in this case is whether the parties could be rightfully tried in Shelby county, the original taking being in Fayette county. The facts are that the parties were chained together, and in custody of the sheriff of Madison county, being carried from this county to the jail of Shelby county, to which they had been remanded by order of this court, for new trials granted in their cases. The prosecutor, one Curry, was in the car where the prisoners were, when the defendants got into a difficulty with him, and robbed him of his watch and chain. They carried it on to Shelby county, where it was taken from the possession of another prisoner, who was along with them in the cars. It is insisted this was not a voluntary carrying of the property into Shelby county, so as to make the parties indictable in that county, but that Fayette county is the county of the venue. In support of this view, the case of Rex v. Simmonds, Moody's Cr. Cas., vol. 1, 408, is cited. In that case the prisoner was indicted in the county of Kent, for stealing two horses. He was apprehended in Surrey, and stated he had been to Dorking to bring the horses, and they belonged to his brother. The police officer then proposed to go to Bromley with him, in order to ascertain the facts. After going part of the way, the defendant said he had left a parcel at some place in Kent, whereupon the police officer went to Kent with him. When they arrived at the designated place, the horses were put up and the prisoner escaped, but was afterwards arrested and tried in Kent. It was held by the judges of England, that there was no evidence of stealing in Kent, and that the prisoner was only triable in Surrey, where the horses were taken. This is all very well, but does not meet this case. Here the prisoners stole the articles while in custody of the sheriff with the purpose of carrying them to Shelby county, their certain destination. The watch and chain were so carried in pursuance of this purpose, so that the carrying into Shelby was as much their voluntary act as if they had been free from custody, and had stolen the articles in one county with

the design of carrying them to the other—in fact it was more certain in their case, that the articles would be carried to Shelby, than if they had been free, and the purpose is equally clear. We do not think this objection tenable, and the proof being clear, the case is free from doubt.

The judgment must be affirmed.

EXTRA TERRITORIAL FORCE OF STATUTES.

STATE TO USE OF GILBREATH v. BUNCE *ET AL.*

Supreme Court of Missouri, October Term, 1877.

HON. T. A. SHERWOOD, Chief Justice.
" WM. B. NAPTON, }
" WARWICK HOUGH, } Associate Justices.
" E. H. NORTON, }
" JOHN W. HENRY, }

ACTING under authority of a statute of Arkansas, a probate court of that state ordered and adjudged that the disability of non-age of G be removed, "so far as to authorize him to demand, sue for and receive all moneys belonging to him in the state of Missouri, in the hands of his curator or any other person, and to execute releases therefor in the same manner as if he was of full age." In a suit brought by G, in Missouri, against his curator: *Held*, that the statute of Arkansas was inoperative in Missouri, and that the infant could not sue in his own name.

ERROR to the Cooper Circuit Court:

SHERWOOD, C. J., delivered the opinion of the court:

Suit upon the defendant's bond as curator of the estate of the relator.

The petition avers that the relator, Willie Gilbreath, is an infant under the age of twenty-one years, and is now a resident of Washington county, in the State of Arkansas, and that Bunce is the curator of his estate, acting under appointment of the Probate Court of Cooper county, Missouri, and has in his hands as curator notes and money amounting to the sum of two thousand dollars; that the General Assembly of the State of Arkansas, by an act approved February 18th, 1869, entitled, "An act to confer upon the probate and circuit courts, of the State of Arkansas, certain powers for removing legal disabilities of minors;" empowered the several probate courts of the state to authorize any person who is a resident within their jurisdiction, and who is under twenty-one years of age to transact business in general, or any particular business specified, in like manner and with like effect as if the act or thing was done by a person above that age, and that such act should have the same force and effect as if done by a person of full age; that in pursuance of said act the Probate Court of Washington county, Arkansas, at its September term, 1875, ordered and adjudged that the disability of non-age of said Willie Gilbreath be removed "so far as to authorize him to demand, sue for and receive all moneys belonging to him in the State of Missouri, in the hands of his curator or any other person, and to execute releases therefor in the same manner as if he was of full age;" that by virtue of said act and judgment the legal disability of non-age was removed so far as to authorize him to demand, sue for and receive all money belonging to him in the hands of his curator in the State of Missouri. The petition then sets out the bond of the defendant Bunce as curator, and for breach thereof alleges the refusal of Bunce to pay over the money upon demand and asks judgment for the amount in his hands.

The suit is prosecuted by plaintiff in his own name and he appears thereto by attorney. The defendants demurred to this petition alleging as grounds thereof that the petition showed upon its face that Willie Gilbreath was an infant under twenty-one years of age, and that he could not prosecute this suit by attorney but must do so by next friend; that it also showed that Bunce was lawfully possessed of the money and therefore stated no cause of action; that the act of the legislature and the order of the Probate Court of Arkansas was of no validity in this state, and could not affect the property under Bunce's control; and lastly because the petition stated no cause of action. The petition was held insufficient and final judgment entered for the defendant and the case comes here by writ of error.

The demurrer was well taken in that the petition showed upon its face that the party to whose use this suit is brought is an infant under the age of twenty-one years and does not appear by guardian in conformity to the statutory regulation. § 6 p. 1014, 2 W. S.; Ib. § 1 *et seq.*, p. 1003; Higgins v. R. R. Co., 36 Mo. 419; Jones v. State, Ib. 324; Copeland v. Yoakum, 38 Mo. 349.

But the demurrer was well taken for a far weightier reason, a reason going to the very foundation of the suit. The legislature of Arkansas did not possess the power to pass a law to override and control our laws, no more could it authorize the Probate Court of Washington county to do this. Smith v. McCutchen, 38 Mo. 415; Story Confl. Laws §§ 539, 18, 103. Our own statutes (1 W. S. p. 672 § 1, and p. 681 § 48) provide when infants shall attain their majority, and they must be our guides and not the laws which emanate from a foreign jurisdiction.

Judgment affirmed. All concur.

NOTE.—Statutes regulating capacity have given rise to no little conflict of authority. The civilians generally hold that the law of the domicil determines personal capacity, but in this country and in England it has generally been held that statutes recognizing and regulating natural capacity and disability are valid whenever drawn in question; but that statutes creating artificial disability, or removing natural disabilities, have no extra-territorial force. And it may be said generally that the *lex loci contructus aut actus* governs capacity as to contracts relating to movables; and that the *lex rei sitæ* governs contracts relating to immovables.

In the noted case of Saul v. His Creditors, 17 Mart. 596, it was held that the law of the domicil or the *lex loci contractus aut actus* would be applied, so as to give capacity if possible. It was said: "The writers on this subject agree that the laws or statutes which regulate minority and majority, and those which fix the

state or condition of man, are personal statutes, and follow and govern him in every country. Now, supposing the case of our law fixing the age of majority at twenty-five, and the country in which a man was born and lived previous to his coming here placing it at twenty-one, no objection could, perhaps, be made to the rule just stated. And it may be, and, we believe, would be true, that a contract made here between the two periods already mentioned would bind him. But reverse the facts of the case, and suppose, as is the truth, that our law placed the age of majority at twenty-one; that twenty-five was the period at which a man ceased to be a minor in the country in which he resided; and that at the age of twenty-four he came into this state and entered into contracts; would it be permitted that he should, in our courts, and to the demand of one of our citizens, plead as to protection against his engagements, the laws of a foreign country, of which the people of Louisiana had no knowledge? Most assuredly it would not."

Referring to this last decision Mr. Wharton says: "It will be seen, therefore, that the opinion of the Supreme Court of Louisiana, severely as it has been condemned, is that which now obtains through the German Empire, and may be regarded as the law both in England and the United States." Conf. Laws, § 115.

But so far as England and the United States are concerned, Mr. Wharton does not seem to be sustained by the authorities. It is believed that the rule generally followed in this country was correctly stated in Bank of La. v. Williams *et ux*, 46 Miss. 624, where it was said: "It is the prerogative of the sovereignty of every country to define the conditions of its members, not merely its resident inhabitants, but others temporarily there, as to capacity and incapacity. But capacity or incapacity, as to acts done in a foreign country, where the person may be temporarily, will be recognized as valid or not in the forum of his domicil, as they may infringe or not its interests, laws and policies."

LOAN ASSOCIATION — LOANS MADE TO MEMBERS—USURY.

HAWKEYE BENEFIT AND LOAN ASSOCIATION v. BLACKBURN.

Supreme Court of Iowa, April Term (Dubuque), 1878

Hon. JAMES H. ROTHROCK, Chief Justice.
" WM. H. SEEVERS,
" JAMES G. DAY,
" JOSEPH M. BECK,
" AUSTIN ADAMS,
} Associate Justices.

UNDER the laws of Iowa, contracts made by a loan association with its members are subject to the statutes against usury.

APPEAL from Marshall District Court:

The plaintiff is a corporation organized in March, 1870, under the general incorporation law, for the express object of "assisting the members of the association in the acquisition of freehold property, in the erection of buildings and otherwise improving the same, and in the removal of incumbrances or liabilities upon property already held by them, and to enable them to secure the amount of their shares in advance upon furnishing good mortgage security as provided by the by-laws of the association, and to facilitate the accumulation, borrowing and redemption of capital." The capital stock was fixed at $300,000, and the shares were $200 each. The same was to be paid at the rate of one dollar per share each month. It was provided in the articles of incorporation that certain fines might be imposed for non-payment of monthly dues and dereliction of duties on the part of officers.

Such were the sources from which the corporation in the first instance obtained any money and it was loaned to the member who would pay the highest premium therefor. The theory of the organization was, that in ten years or less the accumulations arising from the several sources of revenue would make the shares worth par or $200 each, and whenever that period arrived the assets were to be divided and the corporation cease to exist. But in no event was it to exist longer than ten years.

The defendant became a member of such corporation and subscribed for several shares of the stock. After having paid his monthly dues for some time he applied for a loan of $1,400, and the same was put up to be competed for among the members. The defendant bid 59 1-2 per cent. premium, which being the highest bid, the loan was made to him, to secure which he gave the plaintiff a written obligation and mortgage, and this action is brought to foreclose such mortgage.

The defendant continued to pay his monthly dues and the interest stipulated for when the loan was made for some time thereafter, but finally he ceased to make any payments whatever.

The defendant in his answer alleged that the contract was usurious and that he had paid more than was legally due thereon and asked an accounting and that he be allowed his proportionate share of all the assets of the corporation as an "offset to the contract," and that the mortgage be declared satisfied and cancelled of record.

There was a reference, a finding of facts made by the referee and his conclusions of law reported to the court, which report was confirmed and the mortgage decreed satisfied and judgment rendered in favor of the defendant for $88.73, and against him in favor of the School fund for 53.55. The plaintiff appeals,

Brown & Binford for appellant; *O. L. Binford, W. E. Snelling* and *Caswell & Meeker, for appellee.*

SEEVERS, J., delivered the opinion of the court.

The abstract contains all the evidence, but the appellee objects, there cannot be a trial *de novo* in this court because no motion was made at any time for a trial on written evidence. This objection is well taken. Vinsant v. Vinsant, December term, 1877, and numerous other cases. Error, however, has been assigned and the finding of facts is perhaps sufficiently full and complete to enable us to determine all the questions made by counsel which are of vital importance.

The obligation given by the defendant and secured by the mortgage is as follows:

"$1400. On or before ten years from this date I promise to pay to the Hawkeye Benefit and Loan Association, of Marshall county, Iowa, the sum of fourteen hundred dollars with interest thereon at

the rate of six per cent. per annum, payable monthly, on the first Monday of each and every month, or on such other day as may be fixed upon by said association for the collection of monthly dues of its members. The principal sum of fourteen hundred dollars, and all interest accrued thereon, shall become due and payable whenever the interest shall be more than six months in arrears and unpaid; or at the longest, at such time (not exceeding ten years) as said Hawkeye Benefit and Loan Association shall have accumulated sufficient assets, embracing moneys, property, and notes of like import with this, to divide to each of its members the value of two hundred dollars for each share held by him in the capital stock of said association; and the dividend so accruing to the maker of this note shall be then applied hereon in payments. This note is secured by mortgage on real estate.

Dated at Marshalltown, Marshall county, Iowa, this third day of April, 1871.

JOHN F. BLACKBURN."

The amount of money actually loaned was only $574, and the referee found the contract to be tainted with usury. But this was more in the nature of a legal conclusion from concluded facts, than a finding of facts based on evidence which was in any manner conflicting. Such conclusion is the subject of review in this court.

Associations, incorporated or unincorporated, based on the same general principles as the plaintiff, have existed for some time, both in this country and England. In the latter they do not profess corporate powers, and the ruling there seems to be that such contracts as the one under consideration are not usurious because the associations are mere partnerships, and the transactions constitutes a dealing in partnership funds. Silver v. Barnes, 6 Bing. N. C. 180; Burbidge v. Cotton, 8 E. L. and Eq. 57. It was so held also in Shannon v. Dunn, 43 N. H. 194; Merrill v. McIntire, 13 Gray, 157, and we do not doubt that similar rulings have been made in other states. We believe it to be true that in neither New Hampshire nor Massachusetts was the association vested with corporate powers. Certainly this is true as to the former state. In Pennsylvania the contrary doctrine prevails. Reiser v. William Tell S. F. Association, 39 Pa. St. 137. In Connecticut such associations have corporate powers, and it was in substance held such contracts were usurious. The Mechanics' and Workingmens' Mutual Savings Bank and Building Association of New Haven v. Wilcox, 24 Conn. 147. The same rule was adopted in Buttemore Permanent Building and Land Society v. Taylor, 41 Md.; Mills v. Salisbury Building and Loan Association, 75 N. C. 292; Forest City United Land and Building Association v. Gallagher *et al.*, 25 Ohio St. 208.

Without stopping to enquire whether there is any difference between an incorporated and an unincorporated association it is quite apparent there is a conflict of authority, and that courts of the highest respectability are not in accord on this question. A critical examination of the various cases might demonstrate that this conflict is more apparant than real. Be this, however, as it may, we are fully warranted in establishing such a rule as seems to us to fully accord with the statutes and policy of this state.

The question whether this contract was usurious under the statute in force at the time the contract was made need not be separately considered because of a statute passed in 1872, which, it is insisted, has the effect to remove the taint of usury if such ever existed. This statute forms a part of the code, being sections 1184, 1185, 1186 and 1187 thereof. It is there provided that corporations, to effectuate the same objects as those expressed in the articles of incorporation of the plaintiff, might be organized; and § 1185 provides and determines how and in what manner money may be obtained for the purposes of the corporation. If loans are made to members in strict accord with the provisions of the statute, it is expressly declared that such loans shall not be construed as usurious. Section 1186 is of a legalizing nature, and evidently intended to apply to such corporations as the plaintiff and to contracts like the one in question. It provides that the laws of such corporations, made in pursuance of their "articles of incorporation and by-laws" and the "notes, obligations and securities" taken therefor "shall not be construed or held to be usurious by reason of any fines or premiums for the right of preference in taking such loans, paid in addition to the *legal rate of interest*, but the same shall be valid and binding in all respects; the payment of such fines or premiums in addition to a rate of interest *not exceeding ten per centum per annum*, payable annually, or at any less period, notwithstanding." The legal rate of interest can not in this state exceed ten per centum per annum on the sum actually loaned. If any greater rate is charged or received, either directly or indirectly, the contract is usurious. Code §§ 2077, 2078.

The amount of money actually loaned being only $574, and the plaintiff having charged and received as interest thereon for each month the sum of $7, such contract is usurious, because interest thereon at the legal rate would only amount to $4.78 1-3 if paid monthly.

There can be found in the statute no words which warrant the construction that interest might be charged or received on the premium bid for the money loaned. The language used forbids such construction for the interest can not thereunder exceed the legal rate. Before such an exaction in the shape of interest can be judicially sustained, the authority for it should be found unequivocally expressed in the statute. Section 1185, of the code, is in substance the same as the Ohio statutes, and it was expressly held in the Forest City United Land and Building Association v. Gallagher, *supra*, that the Ohio statutes did not authorize a charge or payment of interest on the premium. It can not be presumed the general assembly intended to legalize contracts which the statute did not authorize.

We therefore hold the statute does not legalize or make valid the contract in question because more than ten per cent. per annum is exacted on

the money actually loaned. This view relieves us of the necessity of determining whether the legalizing statute is retrospective, and, if so, whether it is unconstitutional.

The referee found the defendant had paid on the contract, exclusive of monthly dues and fines, $336, and, as a conclusion of law, that he was entitled to credit therefor on the sum actually borrowed. This result, in case the contract is found to be tainted with usury, is not, as we understand, seriously contested by appellant.

The referee also found the defendant was entitled to monthly dues to the amount of $326.73, which he had paid to the plaintiff from time to time. In this way the result is reached that defendant is entitled to a judgment against the plaintiff.

It will be seen the written obligation in no manner refers to the monthly dues, nor does the mortgage. If the interest is in arrears and unpaid for six months the principal sum becomes due.

But the non-payment of dues does not produce this or any other result, so far as the contract is concerned. In other words, the payment of such dues is not secured by the usurious contract. Nor did the referee so find, but that the defendant was entitled to a credit for such monthly dues under article thirty, of the "constitution and by-laws" of the corporation, which is as follows:

"Members whose dues and penalties are all paid up, may, on one month notice, withdraw from the association, and shall be entitled to receive back the money they have actually paid for monthly dues, deducting the proper proportion of all losses which the association may have sustained. Members wishing to withdraw, who have had loans from the association, must also first pay up the principal and interest due upon such loans."

The referee found at the time the defendant filed his answer and cross petition he was indebted to the plaintiff for monthly dues $77; fines, $7.70; and interest on dues, $1.57. According to the plain and explicit provisions of the foregoing article, before the defendant could sunder his connection as a member with plaintiff, and receive back the money actually paid, he must have paid up all his dues and penalties.

From the money so paid must be deducted his proper proportion of the losses, and he must also pay the principal and interest thereon of all money loaned him by the plaintiff.

Now as he was in debt to the plaintiff for dues and penalties and interest thereon he was not entitled to withdraw from the corporation and receive the money actually paid. There is no finding whether or not the corporation has met with any losses. We incline to think it should affirmatively appear it had not before the defendant can receive back the whole of the money actualy paid.

Of course he was not under any legal obligation to pay the interest on the money borrowed, for none is due the plaintiff thereon.

The defendant therefore did not have the right to withdraw from the association at the time he filed his answer, because he was then indebted to the association. For ought that appears in this case, the defendant may not be entitled to receive back anything by reason of losses. The amount due for dues and penalties must be paid. The losses ascertained, and, if any, the defendant's proper proportion thereof deducted from the sum paid, and the defendant is entitled to the residue, and has no further interest in the corporation. The cause is remanded to the circuit court for further proceedings in accordance with this opinion. REVERSED.

PARTNERSHIP—COVENANT NOT TO ENGAGE IN ANY BUSINESS EXCEPT FOR BENEFIT OF PARTNERSHIP—CLAIM FOR PROFITS.

DEAN v. McDOWELL.

English Court of Appeal, March, 1878.

1. THE RIGHT OF ONE PARTNER TO SHARE IN THE PROFITS MADE BY ANOTHER PARTNER in another business carried on in contravention of the partnership articles is confined to three cases, viz.: where the profits have arisen (1) by use of the partnership property; (2) from a business in rivalry with the partnership; or (3) in a transaction carried on by taking an unfair advantage of his connection with the partnership. In other cases there is no such remedy unless it is expressly given by the articles.

2. CLAIM FOR PROFITS—REMEDY.—Without this the partners are in the simple position of covenantor and covenantee, and the only remedy is by injunction or dissolution, or, after the termination of the partnership, by action of damages. *Dicta*, in Story, and other text books overruled.

The plaintiff and defendant entered in 1866 into articles of partnership as Dean Brothers, in which the defendant was made the managing partner, and covenanted (clause 8) to devote his whole time to the business, and also (clause 11) that "he would not alone nor with any other person either directly or indirectly engage in any trade or business except on account and for the benefit of the partnership." The business of the firm was that of salt merchants and salt brokers, selling salt upon commission for manufacturers, among whom their chief constituents were a firm of Nicholas, Aston & Co.

The partnership between plaintiff and defendant expired by effluxion of time on the 28th of February, 1873. Subsequently the plaintiff discovered that in 1871 the defendant had entered into a secret partnership with one Wilson to purchase the business of salt manufacturers belonging to Nicholas, Aston & Co., and to carry it on simultaneously with his partnership with the plaintiff.

The transaction was arranged in the following manner: The defendant provided the capital for the purchase and carrying on of the business of Nicholas, Aston & Co., but put in a son as nominal partner of Wilson. The son executed a declaration that he was only nominee of his father. Articles of partnership were entered into between Wilson and the

defendant's son for a term which would expire one month after the termination of the defendant's partnership with the plaintiff, *i.e.*, on the 31st of March, 1873, and the business was carried on under the old name of Nicholas, Aston & Co. Accordingly the defendant after the termination of his partnership with the plaintiff took his son's place in the partnership with Wilson, and they then continued the business of salt manufacturers, selling their own salt and not employing brokers.

The plaintiff on discovering these facts filed a bill in 1874 claiming an account of the profits made by the defendant in the business of Nicholas, Aston & Co., during his partnership with the plaintiff.

After this, Wilson retired from the firm of Nicholas Aston & Co., and left the defendant the sole owner of that business.

The plaintiff brought a further action in which he claimed to have the business of Nicholas, Aston & Co., accounted for to the partnership of Dean Brothers, as an accretion from the advantage taken by the defendant of his fiduciary position in the latter partnership.

Nov. 20, 1877.—The suit and action were heard together before the Master of the Rolls.

Southgate, Q. C., *Chitty*, Q. C., and *Rotch* for the plaintiff

Roxburgh, Q. C., *Davey*, Q. C., and *C. Parke* for the defendant.

JESSEL, M. R.:

In my opinion there is no equity whatever in this bill; and as I have often said upon questions of construction, if there is a question of construction in this case, I am never apt to be very positive as to the correctness of my opinion, because it is only an opinion, but I must say that to my mind there is no question whatever here. It is a clause as familiar to me as any clause that was ever penned. It is correlative to clause 8. The two clauses mean this: clause 8 means that the partner shall devote himself diligently to the business, and clause 11 means that he shall not engage in any other business. That is the whole of it. The words are not in any "other" business, because the first business is not mentioned, but the words are that he shall not directly or indirectly engage in any trade or business except on account and for the benefit of the partnership, that is, excepting the partnership business. But there is no covenant that if he does he will account for the profits to the partnership, which is what this bill asks for. It is a simple breach by engaging indirectly. It does not appear to me at present that he has damaged the partnership at all, but this is not a bill for damages, it is a bill to take an account of the share of the profits made by him in another business in which he engaged by the agency or intermediacy of a trustee. He was indirectly engaged, because he furnished the capital and took the profits. It is not even alleged that he neglected the partnership business, or that the partnership sustained any damage whatever.

That being so, it appears to me that this article is to be enforced, and has always been enforced, when a breach is discovered, either by injunction to restrain the man from engaging in the other business, or by a dissolution. The mischiefs of his engaging in another business are two: it may be it turns his mind from the partnership business, and takes away his time and attention, which did not happen in this case; or it may be that it makes him liable for the losses of the other business, and so may involve him and damage the partnership in which he is engaged. Therefore the other partners have an option of intervening by injunction, and that has been the remedy usually adopted; or they may, at their election, dissolve the partnership for breach of the article. Those are the two remedies. But ever since the Court of Chancery existed till it was abolished no one ever heard of such a bill as this, frequent as the breach, I am afraid, has been. This is pretty good proof that there is no such equity.

But, in addition to that, I go upon the plain words. It is a mere negative covenant, and is not an affirmative covenant at all. It does entitle the partners in the present business to interfere or to take his share of the other partnership business, or interfere in it in any way whatever, as far as I understand that covenant. Therefore, there being no superadded equity, it seems to me that the bill wholly fails, and ought to be dismissed.

As regards the costs, in my opinion, what he did was a breach. It may not have done any harm to the partnership, or it may. I do not see any claim for damages. At the same time a man who enters into engagements of this kind should observe them; and when a bill is brought against him, and more especially when he has not demurred, or put in an answer attempting to defend his conduct, I think I must say that he is so blameable for what he did that it warrants me in dismissing the bill without costs.

As to the claim in the second action, in my opinion, that is simply extravagant, and should be dismissed, with costs.

The bill, therefore, will be dismissed, without costs, and there will be judgment for the defendant in the action.

From this judgment the plaintiffs appealed.

Southgate, Q. C., and *Chitty*, Q. C., (*Gazdar* with them).

The Master of the Rolls held that the clause in the articles, for breach of which we sue, was put in for a particular purpose, and that our only remedy is by injunction or dissolution. But by the secresy of the transaction we are deprived of that remedy, and we are entitled to the remedy we ask. Courts of equity have always allowed this remedy in cases where there is no legal duty—*e.g.*, as between patentee and infringer of patent. In support of their contention they quoted Somerville v. Mackey, 16 Ves. 382; Lock v. Lynam, 4 Ir. Ch. Rep. 188; Russell v. Austwick, 1 Sim. 52, and they especially relied upon the concurrence of a series of text writers upon the subject with regard to the specific claim of a right to the profits of the other business. Story's Equity Jurisprudence, p. 669; Collyer on Partnership (1840) p. 165; Bisset on Partnership (1847) p. 134. [JAMES, L. J.—It is of no use to

quote these text writers. They all copy from one another, and give us as their only authority the case of Somerville v. Mackey, which in reality is not a decision to that effect. Text writers are not legislators.] Lindley on Partnership (1873), pp. 595, 609, quoting Burton v. Wookey, 6 Madd. 367; Gardiner v. McCutcheon, 4 Beav. 534.

Roxburgh, *Q. C.*, and *C. Parke*, for the respondents, were not called on.

JAMES, L. J.:

The order of the Master of the Rolls cannot be reversed. It is quite a new thing in equity that a mere breach of covenant should entitle the covenantee to the profits made by the breach. It is true that in all matters of partnership, there must be the utmost good faith, and that there is a fiduciary relation between the partners. One partner must not use the partnership assets nor carry on the partnership business, nor any other similar business, except for the benefit of the partnership; that is, he must not in any way act in rivalry with the partnership. If he does any of these on his own account, that is really part of the thing for which the partnership was established, and therefore his partner is allowed to take a share of the profits. In this case the partner did not enter into any business in any way analogous to the business of the firm, which was that of merchants and brokers selling on commission the produce of salt works. The business in which the defendant engaged was that of a manufacturer of salt. If he had deprived the firm of any profits they would have made, or had diverted business from the firm, then they might claim the profits. But it is not alleged that he did anything of the sort, or that there was one farthing's worth of actual damage to the work in which the firm traded. It was not a benefit arising out of his connection with the partnership; there was no other obligation between him and the defendant than that of an ordinary covenantor with his covenantee. It might have resulted in damage to the firm, but it was not in any way connected with the fiduciary relation of partners. The Master of the Rolls was right in saying that it was an act which did not result in any loss to the partnership, and could not have so resulted unless the defendant's time had been given to the other business and lost to the partnership. Then damage might have resulted, which might have been matter for an action for damages; but here it was not so, and there is no damage; and if no damage, certainly no sort of claim to profits.

The subject-matter of the second action is extravagant.

COTTON, L. J.:

No doubt the defendant committed a breach of the partnership articles. The question is what the plaintiff is entitled to. I agree with the Master of the Rolls that the clause is not one which gives a right to profits in any other business engaged in by a partner. The object of the clause is to keep the whole of the partner's time to the partnership business.

I had more doubt upon the general principle of the partnership contract. The only case cited which bore upon the point was that of Somerville v. Mackey, but the points there were entirely different. The plaintiff and defendant had entered into a joint adventure for exporting goods to Russia; the business in which the defendant engaged was within the scope of the partnership, and it could not be allowed that he should keep the profits. Here the defendant's other business is in no way within the scope of the partnership business. It was dealing with salt, but in a totally different way; and the profit was not made out of the firm in which he and the plaintiff were engaged. Therefore it is not within the rule that a partner is entitled to share in the profits.

There are clear rules and principles which entitle a partner to share in the profits made by his partner. If they are made from a trade within the scope of the partnership business, then the partner who is engaging in that secretly, cannot say that it is not the partnership business. It is that which he ought to have engaged in only for the purposes of the partnership.

The same principle holds in the case of the use of the partnership assets, for then the profit is made out of the partnership property. So if a man use his position as a partner to get a profit or a business which is profitable or an interest in the partnership property or in property which the partners require, he cannot hold it for himself.

But this business of the defendant in the present case not being within the scope of the partnership, nor acquired by him by means of his connection with the firm, nor by a use of the partnership assets, there can be no ground for this claim to the profits.

The second action is disposed of by the consideration that the business was not acquired by the defendant by any advantage taken of his position as a partner with the plaintiff.

THESIGER, L. J.:

In this case there has been a clear breach of covenant by the defendant. But the covenant itself does not attach to the breach the specific remedy which the plaintiffs claim. We must go then to general principles. An action at law would arise upon the breach, but that would not suit the plaintiff, because there has been no loss as the result of the breach, and he would only recover nominal damages. The plaintiff therefore seeks to follow the profits made by the defendant. He must obtain this relief, if he is to succeed, upon some established principle of law or equity. I am unable to find any to support his contention. From the cases that have been cited there are to be deduced three principles correctly laid down by Mr. Justice Lindley in his book on Partnership:—

1. A partner shall not be allowed to obtain any exclusive advantage by employment of the partnership property; and this is illustrated by the cases of Burton v. Wookey and Gardner v. McCutcheon.

2. A partner is not to derive any exclusive advantage from transactions which are in rivalry with the business of the firm. This is illustrated by the cases of Somerville v. Mackey—if, indeed, that case is to be treated at all as a decision on this point—and Lock v. Lynam.

3. A partner is not allowed in transacting the partnership affairs, to carry on a separate trade which, were it not for his connection with the partnership, he would not be in position to carry on. An instance of this is where a partner obtains the renewal of a lease upon which the partnership business is carried on. Another is the case of Russell v. Austwick, 1 Sim. 52, where one member of a *quasi*-partnership obtained a separate and private contract on his own account.

These principles do no apply to the present case. Here the trade of the defendant is not with partnership property; it is not in rivalry with the partnership; and it cannot reasonably be urged that the contract between the defendant and Nicholas, Aston & Co. was in any way the sequence or consequence of his partnership with the plaintiff.

Appeal dismissed, with costs.

STATUTE OF LIMITATIONS — JUDGMENT LIEN—ILLINOIS STATUTE.

PRATT v. PRATT.

Supreme Court of the United States, October Term, 1877.

1. THE STATUTE OF LIMITATION for the action to recover possession of land is not applicable to the lien of a judgment creditor on the land, though the judgment debtor may sell and convey the land with possession to the party setting up the statute.

2. THE STATUTE DOES NOT BEGIN TO RUN in such case until the land has been sold under the judgment and the purchaser becomes entitled to a deed, because until then there is no right of entry or right of action against the defendant in any one.

3. BUT AS SOON AS THE JUDGMENT CREDITOR places himself, by sale and purchase of the land, in a condition that he can bring a suit for the possession, the statute begins to run against him. These propositions are applicable to the Illinois act of 1885 limiting actions for the recovery of land to seven years.

In error to the Circuit Court of the United States for the Northern District of Illinois.

Mr. Justice MILLER delivered the opinion of the court.

This is an action of ejectment in which plaintiff in error was plaintiff below. On the trial he proved title in Isaac Speer, in August, 1857, at which time he recovered a judgment against said Speer, under which the land in controversy was sold July 8, 1863, and a deed made to plaintiff, founded on that sale, February 24, 1865. There does not seem to be any question but that this vested in the plaintiff the legal title to the land some four years before the date of the commencement of this action; which was the 15th day of May, 1869.

Defendant relied solely on the statutes of limitation of seven years as found in the act of the Illinois legislature of 1835 and 1839, page 674 of the Revised Statutes of 1874. We are not favored with any argument, oral or written, by defendant in error, and have had to find out for ourselves on what he bases the defense of the court's ruling.

It does not appear that the defense, under the act of 1839, was established, but the court instructed the jury that if they believed certain facts were proved, which facts had reference to the seven years' possession under the act of 1835, their verdict should be for the defendant.

The law of 1835 provides: "No person who has or may have any right of entry into any lands, tenements, or hereditaments, of which any person may be possessed by actual residence thereon, having a connected title in law or equity, deducible of record from this state or the United States, or from any public officer or other persons authorized by the laws of this state to sell such lands, for non-payment of taxes, or from any sheriff, marshal or other person authorized to sell such land on execution, or under any order, judgment or decree of any court of record, shall make any entry therein, except within seven years from the time of such possession being taken; but when the possessor shall acquire such title after the time of taking such possession, the limitation shall begin to run from the time of acquiring title."

The defendant has, we think, brought himself within the language of this section by sufficient proof, so far as actual possession for seven years under a connected title in equity deducible of record from the United States could do so. And on this proposition alone the court told the jury to find for the defendant. But this instruction failed to give effect to the other evidence before the jury and undisputed, which, we think, had an important bearing on the case.

Upon an examination of the plaintiff's title it will be seen that he had no right of entry until February 24, 1865. If the statute began to run against him at that time it had not run seven years, but only a little over four when the suit was brought. Nor was there a right of entry, or right of action, in any person against defendant during his entire possession, until the marshal's deed was made to plaintiff, for the reason that the equitable title, under which defendant held possession, was derived from Speer. That is to say, after the judgment to plaintiff against Speer was rendered, and a lien on the land thereby established in favor of plaintiff, Isaac Speer, the judgment debtor, conveyed the land to Thomas Speer, and Thomas Speer conveyed to Samual Roberts, and Samuel Roberts to Charles L. Roberts. The defendant connected his possession with this title by showing a contract of purchase from Charles L. Roberts. It is obvious from this recital that there was no one who could lawfully enter upon the land in the defendant's possession until the plaintiff's judgment lien had become perfected into a legal title by sale and conveyance.

Was it the purpose of this statute that the period of limitation should begin against one who had a lien of record on the land, but who was in no condition to make entry or bring suit, and when the person in privity with him that could otherwise have made entry or brought suit, had parted with that right to the defendant?

The very first words of the section describe the person against whom the act is directed as a person having a right of entry. While no such strict construction can be maintained as that this right of entry must be in the same person during the entire seven years that possession is running in favor of defendant, it seems reasonable that this period of seven years is not to begin when there was no right of entry in any one who could oust the defendant. The principle on which the statute of limitation is founded is the laches of the plaintiff in neglecting to assert his right. If, having the right of entry, or the right of action, he fails to exercise it within the reasonable time fixed by the statute, he shall be forever barred. But this necessarily presupposes the existence of the right of entry, or the right to bring suit. There can be no laches in failing to bring an action, when no right of action exists. There can be no laches in asserting a right to the possession of property held by another when that other is in the rightful possession.

But the possession then rightful may, by the termination of the right under which it is held, or by the creation in some legal mode of a superior title, cease to be rightful. The right of possession may, in some of these modes, come into another. It is then that laches begin, if the person who has thus acquired the better right neglects to assert it. And it is then that the principle of the limitation of actions for recovery of the land first applies, and if uninterrupted for the prescribed period becomes a perfect bar to the recovery of the rightful owner. There is nothing in this statute which appears to conflict with this view. The possession must be continuous, and connected with color of title, legal or equitable. There must be a right of entry in some one else to be told by this seven years' possession, and the possession must be adverse to this right of entry.

It is said that under the decisions of the courts of Illinois such possession as that of the defendant in the present case is adverse to all the world. There is no doubt but the Supreme Court of Illinois has said this, and that in a general sense it is true.

The defendant, having purchased the land of the person who had the legal title, does undoubtedly hold adversely to every body else. He admits no better right in any one. He is no man's tenant. The right by which he holds possession is superior to the right of all others. He asserts this and he acts on it. His possession is in this sense adverse to the whole world. But it is not inconsistent with all this that there exists a lien on the land—a lien which does not interfere with his possession, which can not disturb it, but which may ripen into a title superior to that under which he holds, but which is yet in privity with it. In the just sense of the term his possession is not adverse to this lien. There can be no adversary rights in regard to the possession under the lien and under the defendant's purchase from the judgment debtor until the lien is converted into a title conferring the right of possession. The defendant's possession after this is adverse to the title of plaintiff, and then, with the right of entry in plaintiff, the bar of the statute begins to run.

This is a question of the construction of the statutes of Illinois, and the case of Martin v. Judd, 81 Ill. 488, is supposed to be in conflict with what we have here said. But we are unable to see anything in that case to justify such a conclusion. It is true the plaintiff in that case, as in this, asserted title under a judgment, a sale, a marshal's deed. The defendant asserted title under a judgment against the same party and a sale and conveyance by the sheriff. The judgment under which plaintiff claimed was rendered July 14, 1854; sale, September 1, 1856, and marshal's deed, June 28, 1858. The judgment under which defendant claimed was rendered March 4, 1858; sale, November 7, 1859; sheriff's deed, October 14, 1862. The defendant relied on the seven years' statute of limitation. The suit, however, was commenced April 7, 1873, and the plaintiff had his marshal's deed June 28, 1858, which was fifteen years before he brought his action. The plaintiff, therefore, had the right of entry and a right of action for fifteen years before he brought suit.

During all this time, or at least during the last seven years of it, the defendant had a possession under a title which was in every sense adverse to that of plaintiff.

In the case before us, plaintiff sued within five years after his lien became a title. Two of the seven years possession on which defendant relies was at a time when plaintiff had no title, and consequently no right of action, and while none existed in those from whom he derives title. The case of Martin v. Judd can not, therefore, raise the only question there is in this case. The instruction of the court to the jury, and the comments in the opinion of the supreme court, show that the point in controversy in that case was whether the defendant had shown a *continuous* possession *adverse to plaintiff*. That it was adverse there can be no doubt, though it was insisted that it was otherwise because held under a title derived from the same person that plaintiff's was. But it is very clear that after the deed of the sheriff under the sale on the junior judgment, the possession held under that deed was a possession in conflict with and adverse to the title then held by plaintiff, viz.: his deed under the senior judgment.

The opinion in the case of Martin v. Judd refers to and cites with approbation the opinion of the court in Cook v. Norton, 48 Ill. 20. That case was twice before the Supreme Court of Illinois, and received, as is evident, a very careful consideration. It is reported in 43 Ill. 392, and 48 Ill. 20. In that case Ryan was the common source of title. A judgment was recovered against him August 14, 1845, and a sale under execution of that judgment was made April 8, 1864. No deed was made under this sale until July, 1860, more that fourteen years after the sale, though the certificate of sale was filed in the recorder's office when it was made. Ryan conveyed the property, in a few months after the judgment was rendered, to persons under whom the defendants held title and possession.

The suit was commenced within the seven years after Cook obtained the sheriff's deed, but as this was fourteen years after the sale, the question raised was when the statute begun to run against Cook's title. A few extracts from the learned opinion of Mr. Justice Lawrence will show that the court is in accord with the views we have already expressed.

"Would any one deny," he asks, "that the purchaser in possession could protect himself, by proper proof, under the statute of limitation, if more than seven years had elapsed from the time when the prior purchaser had received or *might* have received his deed? * * * The defendant has never acknowledged a lessor, or any title paramount to his own. It is true the statute of limitation did not begin to run in his favor until the expiration of fifteen months from the sheriff's sale, *because until then there was no outstanding title upon which suit could be brought.* But upon that day the purchaser at the sale was at liberty to take out his deed, clothe himself with the legal title, and demand possession, and from that day the statute began to run." The fifteen months here alluded to was the time which was allowed after a sale under execution for the debtor, or any other judgment creditor of the debtor, to redeem the land by paying the amount for which it sold, with interest. "But," contined the court, "although the sheriff's deed, made on that day, would have divested the legal title from Clark and vested it in the purchaser, that fact would not have converted Clark into a tenant. From that moment he became a trespasser and might have been sued as such." Again, speaking of the defendant, Clark' the court says: "His possession began under his deed as a possession hostile to all other persons, and though the statute of limitations did not begin to run until the expiration of fifteen months from the day of the sheriff's sale, it was not because there was no adverse possession, in fact, until that day, *but because until then there was no person in being who could bring the suit.* That the sheriff's deed must be considered as having been made when the right to it accrued, so far as the statute of limitation is concerned, is conceded by counsel for appellant."

These very clearly stated views of the Supreme Court of Illinois must control the present case. The plaintiff's right to the marshal's deed accrued July 8, 1863. The statute of limitations began to run on that day, and the bar of seven years would have become perfect on the 8th of July, 1870. This suit, however, was commenced on the 30th of April, 1869, more than a year before the statute bar was completed.

If we are wrong in what we have supposed to be the law, it must follow that in all cases in which the owner of real estate owes money which is a lien on the land in his hands, the statute of limitation begins to run against that lien as soon as he conveys the land with possession to some one else. It can make no difference in the principle asserted whether the lien be created by a judgment or by a mortgage. Nor can it make any difference whether the debt secured by the lien be due when the conveyance is made or has ten or twenty years to run before the lien can be enforced against the land. The principle asserted is applicable in all these cases, namely: that from the day of the conveyance by the debtor of the land on which the lien of the debt exists to some third person, accompanied by transfer of possession, the possession of the purchases is adverse to the lien holder, and the limitation of seven years begins to run. If this be established to be the law, the owner of the real estate may borrow money on ten years' time, to the value of that estate, and give a mortgage on it to secure payment, and by a sale and conveyance of the land to a third person, with delivery of possession a week afterwards, the lien is utterly defeated. For the statute of limitation begins to run, according to this doctrine against the mortgage, the moment the title and possession are vested in the purchaser, and the bar of statute becomes perfect against all the world by seven years' possession, whereas the mortgagee can take no steps to foreclose his mortgage until his money comes due, three years later.

And this doctrine is asserted in the face of the fact that there is a limitation law specially applicable to the enforcement of the judgment lien by sale under execution, and the enforcement of the mortgage lien by foreclosure.

This question came before the Supreme Court of Pennsylvania in the case of Cutler v. Phillips, 20 Penn. St. 155, and was fully discussed. We will close this opinion by giving verbatim the closing remarks of the court in that case so perfectly applicable to the one before us. "Lien creditors," says the court, "are subject to a limitation of five years, but the statute of limitations that concerns the action of ejectment has no relation to them. They have no estate in the land, no right of entry, no action to be affected by the statute. The statute bars the right of action and protects the occupant, not for his merit, for he has none, but for the demerit of his antagonist in delaying his action beyond the period assigned for it. But what right of action has a lien creditor to delay? His only remedy is by levy and sale. He then has an estate and a right of entry. The statute may then attach. Before it cannot.

The peremptory instruction of the circuit court to the jury, that the facts we have stated established a good defence, was erroneous, and the judgment must be reversed and a new trial had; and it is so ordered.

Mr. Justice CLIFFORD dissenting.

I dissent from the opinion of the court in this case for two principal reasons: (1) Because it conflicts with the decisions of the state court upon the same subject. (2) Because the statute of limitations, applicable to the case, began to run when the defendant acquired the open, exclusive, adverse possession of the premises by actual residence thereon under claim and color of title, it appearing that he continued to reside there without interruption for the period of seven years prior to the commencement of the suit, having entered pursuant to a contract with the owner who had a connected title to the same deducible of record,

from the United States, and that the defendant subsequently acquired the title to the premises in pursuance of the contract, the rule being that such an adverse possession, if uninterrupted and continued, for the period of seven years, is equivalent to an absolute title when confirmed by a conveyance from the party having a connected title deducible of record, from the United States. Examined in the light of these suggestions, it is clear, in my opinion, that the case was properly submitted to the jury, and that the judgment founded on their verdict should be affirmed.

CORRESPONDENCE.

AS TO ENGRAFTING EXCEPTIONS ON STATUTES OF EXEMPTION.

To the Editor of the Central Law Journal:

In an article on Exemption Laws, in the April-May number of the *Southern Law Review*, p. 6, it is correctly stated that Pratt v. Burr, 5 Biss. 36, and Riddell v. Shirley, 5 Cal. 488, can not be reconciled with certain other cases there cited, upon the question as to whether an insolvent debtor can, while insolvent, take from his assets money or property not exempt, and invest the same in property which is by name exempt and by statute exempted, and hold the property thus acquired free and discharged of pre-existing debts.

To Pratt v. Burr, and Riddell v. Shirley, may be added the cases: *Re* Wright, 8 B. R. 431; *Re* Boothroyd & Gibbs, 14 B. R. 223, in both of which is discussed the question under consideration. In *re* Wright it was held that an insolvent could not, on the eve of bankruptcy, sell his homestead, remove with his family into a part of his store building as a dwelling, and hold it as a homestead exempt, although the statute of Wisconsin exempts to the debtor absolutely the dwelling house occupied by a debtor and the land on which it is situated (not exceeding a certain area) without limit as to value; and, although when the petition for bankruptcy was filed, this store was his only dwelling, and the lot did not exceed the statutory limit.

The Supreme Court of Wisconsin, long before, in Phelps v. Rooney, 9 Wis. 70, had held that a debtor residing in the upper story of his store building, and having no other homestead, might hold the whole building exempt; and such is still the law of this state. But no question was then made as to the insolvency of the debtor at the time of acquiring the property. The decision in the Wright case went upon the ground of a *fraudulent* appropriation of property *not* exempt to the purposes of a homestead which was by statute declared to be exempt, and, because of the fraud, condemned the transaction and refused the exemption. In principle there seems to be no distinction between this case and Pratt v. Burr.

In *re* Boothroyd and Gibbs, which arose under the homestead law of Michigan, decided in 1876, Gibbs, one of the firm, appropriated $2,200, assets of his firm, to the purchase of a homestead, while he and firm were insolvent, and only three days before bankruptcy. The case does not show whether his partner knew of or assented to such appropriation; but the court held that question immaterial, giving its reasons at length, and, in the course of its opinion, saying, "if the facts of this case called for it, I think I should be prepared to go much further, and to hold that a debtor, knowing himself to be insolvent, has no right, on the eve of bankruptcy, to take his property and invest it in a homestead," citing Grimes v. Byrne, 2 Minn. 89, and commenting at length upon O'Donnell v. Seegar, 25 Mich. 367. The principle upon which both these cases were decided is, that a fraud upon creditors was intended; it is true that in both cases insolvency not only existed, but the debtors in each case *must have known* it themselves when they attempted to acquire the homestead. How far such knowledge entered into the decision of the case we are left to conjecture, merely.

If a debtor, in fact, hopelessly insolvent, but as yet not conscious of it, should appropriate a large part of his available assets to the purchase of exempt property, and afterwards become bankrupt or his business be closed by judgments and executions, his prior debts remaining unpaid, the case would be exactly *in effect*, as if he had, at the same time, and under the same circumstances, made a voluntary transfer and settlement of money or assets not exempt to or for the benefit of his wife or children, in which last case *knowledge* of insolvency is not necessary in order that the transfer or settlement be set aside at suit of prior creditors. The only questions in such a case are: Was the debtor largely indebted or embarrassed, and if so, had he, besides the property so settled or transferred, ample means wherewith to pay all his obligations? If not, and largely indebted (insolvency need not in fact exist) the settlement can not stand. It would seem, from analogy, that *knowledge* of insolvency would not be necessary in the case of purchase of exempt property by one in *fact* insolvent.

The writer of the article under consideration, at page 6, concludes upon this subject as follows: "The courts, influenced by moral considerations, have sought to introduce an exception where the statute has made none. The weight of authority *and the better reason* appear to be that this can not be done. If the statute is wrong, the legislature should correct it."

With this conclusion it is to be hoped that few will agree. Statutes of exemption, it is true, are for the benefit of the family, as well as of the debtor, a kind of statutory provision or settlement, and are to be liberally construed. That of Wisconsin provides positively, that *none* of the property named as exempt shall be liable to attachment, execution *or sale upon any final process*, &c., making no exception as to how obtained (except as against demands for purchase money of personal property).

But this positive negative provision is no more unyielding and no more imperative than the rule of the common law, that the property of one shall not be liable to be taken for the debt of another.

All property, *in form* or *manner*, legally transferred to or settled upon wife or children, whether voluntarily or upon valuable consideration, by a husband or father, as *between the parties*, belongs to the grantees or donees; yet it is provided by the statute of frauds (which statute is only declaratory of the common law) that if the transfer is made with intent to hinder, delay or defraud creditors, the same shall be void as to the persons so hindered, delayed or defrauded; fraud vitiates all such transactions.

It is safe to affirm that property secured to a party as exempt by statute, is no more sacredly or effectually guarded than that secured by the common law; both furnish a perfect protection to all who claim honestly, but neither protects those claiming fraudulently. In voluntary settlements, if the party making the settlement is at the time largely indebted, *although not insolvent*, and does not retain sufficient to pay all then existing debts, the settlement can not be sustained, as against a prior debt, and sometimes even as against subsequent indebtedness. Parish v. Murphree, 13 How. U. S. 93; Kehr v. Smith, 20 Wall. 35.

In case of sale of chattels and full payment by vendee, if in fact intended by vendor to hinder, delay or

defraud creditors, the vendee, knowing such fraudulent intent, the sale is voidable, and creditors hindered, delayed or defrauded may reclaim the property, or recover its value not only from the fraudulent vendee, but from any other subsequent purchaser, *with notice* of the fraud. Babbett v. Walbrun, 16 Wall. 581.

Such being undoubted law, how can it, with reason, be claimed that property acquired or disposed of fraudulently as against existing debtors should be any more sacredly guarded when claimed under statutes of exemption by the fraudulent debtor himself, than when claimed by his wife or children under a formal valid common law title? The fraud is exactly the same in both cases, the misappropriation of property *not exempt*, and belonging in equity to creditors, to the support of self and family. If the sentence quoted from the article in question is correct, an insolvent debtor may appropriate a large part, if not the whole, of his property, which in equity and common honesty belongs to his creditors, to the purchase of exempt property, and set those creditors at defiance. He may thus accomplish what he could not otherwise do, as by making over the same property in a different form to wife or children for the same purpose. It is as clearly fraudulent for a insolvent debtor to buy exempt property with money which honestly belongs to his creditors, and to hold it freed from their claims, as to invest the same money in other forms of property, for the benefit of wife and children. Equity is not bound by forms, nor, indeed, is the common law fettered, or its efficacy taken away by names. Is it not "the better reason" that the courts may and should introduce just such exceptions upon the statutes of exemption as were introduced by the cases cited?

The question will still always be one of fact, in each case, as in voluntary settlements. In some instances the property claimed as exempt may have been purchased months or years before the insolvency is publicly known, just as in a voluntary settlement; yet in both instances the debtor may have been hopelessly insolvent, though sustaining his credit by false pretenses, and in both instances the real intent may have been to provide a home for himself and family at his creditors' expense. The time at which the settlement is made, or exempt property purchased, is material only as showing the intent. There is no discoverable difference in the two instances, unless it be claimed there is nothing fraudulent in converting assets not exempt into that which is exempt. If such a proposition be advanced, let us suppose an extreme case. A merchant of undoubted credit, residing in Wisconsin, is the owner of no exempt property. He has nominal assets, and is indebted in about an equal amount, but the real value of his assets is less than one-half his debts, and so known to him. He supplies himself with a homestead and all other exempt property specifically allowed by statute, and in so doing exempts all, or more than the value of his entire property. Bankruptcy follows, and then creditors first discover that for years before making such purchases he was clearly and hopelessly insolvent; yet if there is no fraud under there circumstances, he holds the whole property, and creditors receive nothing. It would would seem that "*the better reason*" should be against this. It is difficult to believe that any respectable court of last resort will ever so hold, and it is safe to say that no court of that dignity has ever so held in a case where the insolvency was *known to the debtor at the time* of the transaction.

If it is admitted that such a fraud *may possibly* be committed, then the whole argument is against the conclusion of the author. Courts must engraft exceptions upon exemption laws, or confess themselves powerless to execute the plain provisions of the statute of frauds, or to enforce the simple requirements of the common law. Possibly it may be held that, not only must insolvency exist, but that the debtor must be show to have known it at the time of purchasing the property claimed as exempt, and then to have *actually* intended to hinder, delay or defraud his creditors, to have been guilty of fraud in fact.

My object is not to suggest any particular rule, but to maintain the right of courts to engraft those so called exceptions upon statutes of exemption.

D. S. ORDWAY.

MILWAUKEE, WIS., April, 1878.

NOTES OF RECENT DECISIONS.

REGISTRATION LAW — MEANING OF "FILED."—*Gorman v. Summers.* Supreme Court of Minnesota, 6 N. W. Rep. 53. Opinion by BERRY, J. The word "filed," as applied to a chattel mortgage in sections 1, 2 and 3 Ch., 39 Gen. St., does not include the indorsing and indexing prescribed by section 2, but a chattel mortgage is filed, within the meaning of the statute relating to chattel mortgages, when it is delivered to, and received and kept by, the proper officer, for the purpose of notice mentioned in the statute. "Irrespective of our statute, we think that an inquiry for the ordinary meaning of the word 'file' will lead to the same conclusion. 'File' meant at common law, 'a thread, string, or wire, upon which writs and other exhibits in courts and offices are fastened or filed for the more safe keeping and ready turning to the same.' Wharton's Law Lexicon; Bouvier's Law Dictionary. Within this definition, a paper might be said to be filed when strung upon the thread, string or wire. That particular mode of filing having almost entirely gone out of use, another mode of filing, the purpose of which is the same, has taken its place, so that, as Bouvier says, 'A paper is said also to be filed when it is delivered to the proper officer and by him received to be kept on file.' This which we take to be the present ordinary sense of the word 'filed,' would be presumed to be the legislative sense, unless the contrary is made to appear. That the contrary does not appear, is quite manifest from our previous examination of the statute. See Green v. Garrington, 16 Ohio St. 548."

TRUSTEE EX MALEFICIO — WHAT WILL CONSTITUTE—PURCHASE OF LAND UNDER PAROL AGREEMENT FOR ONE HAVING AN INTEREST THEREIN—DENIAL OF THE CONFIDENCE THUS CREATED. — *Wolford et ux. v. Harrington*, Supreme Court of Pennsylvania, 5 W. N. 260. Opinion by SHARSWOOD, J.— 1. Where one having a *bona fide* claim, whether valid or not, to a piece of land is induced to confide in the verbal agreement of another that he will purchase the land at sheriff's sale for the benefit of the former, and in consequence the latter is allowed to obtain the legal title to the same, his denial of the confidence is such a fraud as will make him a trustee *ex maleficio*. 2. W's land was about to be sold at sheriff's sale; his wife held an unrecorded deed to the same, which she had obtained in good faith; with her own money, and was desirous to save the land from going out of possession of the family. One H, knowing of this deed, advised her not to rely on it, and volunteered to attend the sheriff's sale, bid in the land for her, and give her time to repay the amount bid; and that he would put this agreement in writing as soon as he got the sheriff's deed. H bought the property, but refused to comply with his agreement: *Held*, that he was trustee *ex maleficio* for the wife. 3. The principles laid down in Wolford v. Herrington, 24 Sm. 311, that a party thus purchasing would hold as trustee *ex maleficio*, although the wife had no interest in the land, reconsidered and overruled.

RAPE--SOLICITATIONS WITHOUT VIOLENCE—SEDUCTION.—*People v. Royal*, Supreme Court of California,

1 Pac. Coast L. J. 250. PER CURIAM.—1. The employment of art and devices, without violence, by which the moral power of a female is so corrupted that she will offer no resistance, is not sufficient to constitute rape. 2. The testimony of medical experts, in a trial for rape, as to the effect of indecent liberties upon the mind of the female, is inadmissible; all such practices are to be classed under the head of *solicitation*, and distinguish the crime of seduction from that of rape. 3. Among other matters, the court below charged the jury: "If from all the evidence, you are satisfied that on *or about* the time alleged, the defendant *by manipulation, art or device, or by other means, so bewildered* or overpowered the *mind and will* of this girl as to render her at the time *unconscious of the nature of the act of carnal intercourse*, or powerless to resist it, and under those circumstances he had carnal intercourse with her, he is guilty of rape." *Held*, error. Such language conveys the notion distinctly that *seduction* may be *rape;* that the employment of any art or device by which the moral nature of a female is corrupted, so that she is no longer able to resist the temptation to yield to sexual desire, will render sufficient less proof of resistance than would otherwise be necessary; that consent thus obtained is no consent. The proposition entirely overthrows the established law in respect to the offense with which the defendant is charged. Judgment reversed.

SUBSCRIPTION TO STOCK OF CORPORATION—FRAUD. —*Vreeland v. N. J. Stone Co.* New Jersey Court of Chancery, 2 Stew. (Eq.), 188, VAN FLEET, V. C.—1. Contracts to take stock in a corporation stand upon the same footing as all other conventional obligations. If induced by fraud, they create no obligation, and the injured party has a right to have them abrogated. The rule is universal, whatever fraud creates justice will destroy. For the general rule no authorities are necessary, but the following cases are cited to give instances of its application to the class of contracts under consideration: Central R. R. Co. of Venezuela v. Kisch, L. R., 2 H. L. 99; Smith's Case, L. R. 2 Ch. Ap. 604; Kent v. Land and Brick-making Co., L. R. 4 Eq. Cas. 588; Ross v. Estates Investment Co., L. R. 3 Eq. Cas. 122; s. c., on appeal, L. R. 3 Ch. Ap. 682; Smith v. Reese River Co., L. R. 2 Eq. Cas. 264. The subjection of contracts of this kind to the rule above stated is thus plainly expressed by Lord Romilly, in the case first mentioned: "Contracts of this description between an individual and a company, so far as misrepresentation or suppression of the truth is concerned, are to be treated like the contracts between any two individuals. If one man makes a false statement which misleads another, the way in which that is to be treated affords the example for the way in which a contract is to be treated where a company makes a false statement which misleads an individual." And it has also been held, that if a person is induced, without fraud, to enter into a contract of this description by a promise, on behalf of the corporation, that it will aid him in a specified mode, to pay his subscription, and the promise is not kept, his contract will not be enforced. Burrows v. Smith, 10 N. Y. 550; Ang. & Ames on Corp., § 531. 2. An oral contract of subscription will not be enforced under a charter requiring that such contracts shall be made in writing. Pitts. & Con. R. R. v. Clarke, 5 Casey, 146; Pitts. & S. R. R. v. Gazzam, 8 Casey, 340. 3. Where a fraud is committed in the name of a corporation, by persons having the right to speak for it, for their personal benefit, they will be made to answer personally for the injury inflicted by their fraud.

GUARDIAN'S BOND—"INSTRUMENT FOR THE PAYMENT OF MONEY ONLY"—PRACTICE.—*Carrington v. Bell.* Supreme Court of Wisconsin, 6 N. W. Rep. 59. Opinion by COLE, J.—A guardian's bond is not an "instrument for the payment of money only," within the meaning of section 24, ch. 125, R. S.; and, in an action on such bond, it is not enough to set it out in *hæc verba* and allege that a certain sum is due thereon, but a breach must be distinctly assigned. "This action is brought upon a bond executed upon the 4th of May, 1857, by the defendant, Bell, as guardian and principal [and the other defendants as sureties] upon his being licensed to sell the real estate of minors. The complaint sets out the bond in *hæc verba* and alleges that there is now due the plaintiff, from the defendant, the sum of three thousand dollars, the penalty of the bond. But no breach of the bond is alleged or shown, and we therefore think the complaint is clearly defective. It is, however, said in support of the sufficiency of the complaint, that the instrument counted on is for the payment of money only, within the meaning of the last clause of sec. 24, ch. 125, R. S. and that it was sufficient merely to give a copy of the bond and state the amount due thereon to the plaintiff. We have never supposed that this provision applied to cases of this kind. On the contrary, in actions brought on official bonds, this court has held that a breach of the bond must be clearly assigned or shown. Supvrs. of Town of Franklin v. Kirby, 25 Wis. 498; Wolf County Treasurer v. Stoddard, id. 503; Supvrs. Iowa Co. v. Vivian, 31 id. 217; Gerber v. Ackley, 32 id. 233. s. c., 37 id. 43; Cairns v. O'Bleners, 40 id. 469; Supvs. Wash Co. v. Semler, 41 id. 374; and we see no ground for a distinction between those cases and this.* It is very true this is an obligation to pay money upon the happening of an event, but the money only becomes payable when such event has happened. It is not an unconditional promise to pay any sum."

FOREIGN ATTACHMENT — STATE COMITY — APPOINTMENT OF RECEIVER IN ANOTHER STATE RECOGNIZED AS AGAINST ATTACHING CREDITOR WHO IS A CITIZEN OF THE SAME STATE.—*Bagley v. The Atlantic, Miss. & Ohio R. R.* Supreme Court of Pennsylvania, 5 W. N. 263. Opinion by AGNEW, C. J.—In pursuance of the comity established between the different states, the courts of this state will recognize the appointment of a receiver in another state, unless his claims come in conflict with the rights of our own citizens. B and R, citizens and residents of Virginia, by process of foreign attachment issued in Pennsylvania, attached certain property of a railroad company located and doing business in Virginia. Shortly prior to this attachment, the railroad, by decree of a Virginia court, had passed into the hands of receivers, who claimed the fund attached as against the attaching creditors. *Held*, that the receivers were entitled to the fund, and that the equitable transfer to them of their debt in Virginia was binding upon B and R in Pennsylvania. It is true that the plaintiffs below have a right to sue in this state, just as one of our own citizens might, as we held in Morgan v. Neville, 24 P. F. Smith, 52. But while suit for the debt may be maintained, it is not a legal consequence that the extra-territorial act of an appointment of a receiver in Virginia must be rejected as a defense against these plaintiffs. Such an act, like an assignment by operation of extra-territorial law, rests upon the doctrine of comity, to which our state courts lend their aid when not in conflict with the rights of our own citizens. But this comity should not be exercised where the Virginia court would not itself justify its enforcement. Now, it is clear that as to these plaintiffs, who were citizens of Virginia, the appointment of a receiver was not extra-territorial, but was an act binding on them which the Virginia court would enforce as to them, had their action been brought in Virginia. Then, certainly, they have no right, after the appointment of a receiver by a court within their own state, binding on

them there, to attempt to avoid its effect by escaping from its jurisdiction and coming here to ask us to infringe the comity we owe to the acts of their own courts within their jurisdiction. Instead of comity, this would be unfriendliness; for they ask us to aid them in a violation of their own law. Our own citizens would be protected against the extra-territorial act in a proper case, because they are not bound by it; and our assistance given to the extra-territorial act resting only in comity, would not be given at the expense of injustice to them. The case does not fall within the first clause, 2d section of the 4th article of the Constitution of the United States, that "the citizens of each state shall be entitled to all privileges and immunities of citizens of the several states." As to a citizen of Virginia, the appointment of a receiver in Virginia, binding on him there, is not set aside by this clause of the Constitution. The equitable transfer of the debt there is binding on him here.

ABSTRACT OF DECISIONS OF SUPREME COURT OF INDIANA.

May Term, 1878.

HON. WILLIAM E. NIBLACK, Chief Justice.
" HORACE P. BIDDLE, }
" JAMES L. WORDEN, } Associate Justices.
" GEORGE V. HOWK, }
" SAMUEL E. PERKINS, }

CONTRACT OF GUARANTY—HOW ASSIGNABLE.—Contracts of guaranty are not assignable at common law, but were assignable in equity, and a contract of guaranty, placed upon a negotiable note, is now assignable as an incident of the note itself. 12 Wend. 425; 17 Ill. 459. Opinion by PERKINS, J.—*Cole et al. v. Merchants' Bank et al.*

HANDWRITING—TESTIMONY BY COMPARISON.—In this state, the English rule that a witness, whether an expert or otherwise, will not be permitted to testify as to the genuineness of handwriting by comparison merely, unless the basis of comparison is admitted to be genuine, has been adopted and followed. In such cases the writing from which the comparison is made can not be proven to be genuine by evidence *aliunde*, but its genuineness must be conceded. Opinion by BIDDLE, J.—*Jones v. The State.*

MINORS—NECESSARIES.—The erection of a house on a minor's land is not a necessary. A minor is not liable on his note for money, though he expended the money for necessaries. The indebtedness must be created directly. But if money is furnished a minor which he uses to purchase, and the creditor shows that the money was applied to the purchase of such necessaries, the minor is liable, and so is he for money loaned to pay a debt incurred for necessaries. 1 Salk. 297; 7. N. H. 368: 5 Esp. 28. A minor is also liable for necessaries furnished his wife. Opinion by BIDDLE, J.—*Price et al. v. Sanders et al.*

PROMISSORY NOTE — HOW TRANSFERRED.—One who agrees to transfer a promissory note to another, with qualification, must make the transfer in a mode that will vest the legal title in the party to whom the transfer is to be made, viz., by indorsement; and by agreeing to transfer a promissory note which requires the party's indorsement to pass the legal title, he impliedly agrees to indorse it. If he claims that he was to transfer the note otherwise the burden is on him to show it. Opinion by WORDEN, J.—*Wade v. Gappinger et al.*

ADVERSE POSSESSION — NOTICE OF TITLE.—The adverse possession of a tenant is notice to all the world that he can maintain whatever title he has against all the world. If his possession is naked and without color of title, it is notice only to the extent of his actual visible possession; if his possession is under conveyance to him in fee simple, that is the extent of the notice; and so of any intermediate title, although the purchaser against his right may have no knowledge of his title except his possession. Actual notice that one has possession of land, is equivalent to notice by record. Opinion by BIDDLE, J.—*J. M. & I. R. R. Co. v. Oyler.*

ABSTRACT OF DECISIONS OF SUPREME COURT OF MICHIGAN.

April Term, 1878.

HON. J. V. CAMPBELL, Chief Justice.
" T. M. COOLEY, }
" ISAAC MARSTON, } Associate Justices.
" B. F. GRAVES, }

INTEREST ON THE PAST DUE PRINCIPAL of a written contract is to be allowed at the rate, not above ten per cent., which the contract bore. Such has been the professional and popular construction in this state, which the legislature has countenanced by not changing, and by allowing interest on past due installments of interest at the rate borne by the contract. The statute permitting the collection of interest upon judgments at the rate borne by the contract has, in like manner, been practically and correctly construed as embracing decrees. Opinion by GRAVES, J.—*Warner v. Juif.*

GARNISHMENT — DISCONTINUANCE — VOLUNTARY APPEARANCE — EFFECT OF JUDGMENT. — *Held*, 1. A garnishee proceeding is discontinued by a failure of the plaintiff to appear on the return of a summons to show cause why judgment should not be entered against the garnishees on their disclosure. 2. A judgment against the garnishees on their voluntary appearance to a second summons issued after such discontinuance, does not bar a recovery against him by an assignee of the claim, who, though taking after the original garnishee process was served, was ignorant of the subsequent proceedings. As against the plaintiffs in garnishment the garnishees may have bound themselves by their voluntary appearance, but the assignee's rights could not be changed by anything that took place after the non-suit. Opinion by COOLEY, J.—*Johnson v. Dexter.*

TRUST FUND—APPLICATION BY DEPOSITARY TO TRUSTEE'S DEBT.—Where a bank receives from a trustee or agent, and by his orders credits to his account a fund really belonging to the beneficiary or principal, the mere fact of the bank officers being ignorant of such ownership, and their formal transfer on the bank books of the fund to satisfy a debt due the bank by the depositor, can not bar a recovery by the real owner. There might be room for other considerations if it appeared that the trustee or agent actually participated in and assented to the appropriation by the bank, the latter being without reasonable notice of the true owner's rights; but mere want of knowledge of the true ownership is not sufficient. Pennell v. Deffell, 23 E. L. & E. 460; Van Alle v. Am. Nat. Bk., 52 N. Y. 1; Butler v. Sprague, 66 N. Y. 392; Atlantic Bank v. Merchants' Bank, 10 Gray, 532; Skinner v. Merchants' Bank, 4 Allen, 290; Broderick v. Waltham Savings Bank, 109 Mass. 149; Cook v. Tullis, 18 Wall. 332; Clark v. Iselin, 21 Wall. 360; Merrill v. Bank of Norfolk, 19 Pick. 32. Opinion by GRAVES, J.—*Burtnett v. First Nat. Bk. of Corunna.*

ABSTRACT OF DECISIONS OF SUPREME COURT OF TENNESSEE.

April Term (*Jackson*), 1878.

HON. JAMES W. DEADERICK, Chief Justice.
" ROBT. MCFARLAND, }
" PETER TURNEY, }
" J. L. T. SNEED, } Associate Justices.
" T. J. FREEMAN, }

MISDEMEANOR—ATTEMPTED FELONY.—An attempt to commit a felony, as larceny, is, at common law, punishable as a misdemeanor. Citing 1 Russell Crim. Law, 45. Opinion by FREEMAN, J,—*Nicholson v. State.*

AUTREFOIS CONVICT—A conviction for burglary with intent to commit larceny, will bar a subsequent prosecution on an indictment for the same larceny. Opinion by DEADERICK, C. J.—*State v. De Graffenried.*

DAYS OF GRACE — PRESENTMENT — DEMAND. — When days of grace are not allowed upon a negotiable promissory note (as in Alabama in some cases), the day of maturity is the only proper day for presentment and demand in order to charge indorsers. Opinion by MCFARLAND, J.—*Garland v. West.*

FEME COVERT—PRIVY EXAMINATION.—A certificate by a commissioner appointed under sec. 2077 of the code, of the privy examination of a married wowoman as to her deed, which omits the words "and having been examined," is fatally defective, and the deed is void. Citing Henderson v. Rice, 1 Cold. 225; Peyton v. Peacock, 1 Hum. 140. Opinion by FREEMAN, J.—*Ellett v. Richardson.*

RES JUDICATA—PARTIES AND PRIVIES.—If all the parties in being, having an interest in the subject-matter of the bill, are made parties, a decree construing a will, will be binding upon after born children who may be entitled as remaindermen; and powers exercised under such construction by the executor, in good faith, will be upheld, especially in favor of innocent purchasers. Acc. Freeman v. Freeman, 9 Heisk. 306. Opinion by DEADERICK, C. J.—*Parker v. Peters.*

HUSBAND AND WIFE — MARITAL RIGHTS—WIFE'S EQUITY—WITNESS.—1. Personal property of the wife, in possession of herself and her husband, such as household furniture, becomes in law the property of the husband and subject to his debts, nothing else appearing to show a separate property in the wife. Acc. Wade v. Cantrell, 1 Head, 346. 2. If a chose in action be the separate property of the wife, and she take and retain possession of it or its proceeds, with her husband's assent, her equity in it is as strong as if the husband had held it under a parol agreement to keep and invest it solely for her. 3. *Semble*, that a wife is a competent witness in her own behalf, though her husband be a necessary party to the same case with her. Opinion by MCFARLAND, J.—*Cox v. Scott.*

ABSTRACT OF DECISIONS OF SUPREME JUDICIAL COURT OF MASSACHUSETTS.

March Term, 1878.

HON. HORACE GRAY, Chief Justice.
" JAMES D. COLT, }
" SETH AMES, }
" MARCUS MORTON, }
" WILLIAM C. ENDICOTT, } Associate Justices.
" OTIS P. LORD, }
" AUGUSTUS L. SOULE, }

USE OF INITIALS INSTEAD OF FULL NAME. — Under the Gen. Stats., c. 150, § 5, requiring the name of the owner upon whose premises a mechanic's lien is claimed to be set out in the statement to be recorded with the city or town clerk, if the initials only of the christian name of such owner are given, it is sufficient. Patrick v. Smith, 120 Mass. 510. Opinion by SOULE, J.—*Getchell v. Moran.*

ACTION FOR FALSE REPRESENTATIONS — DISCHARGE IN BANKRUPTCY. — In an action of tort founded on false representations by the defendant as to the amount and character of his property, by which the plaintiff was induced to sell him certain merchandize and perform for him certain labor, the defendant having pleaded a discharge in bankruptcy, the plaintiff demurred. *Held*, that the demurrer was good, the action being excepted, by U. S. Rev. Stats., § 5117, from the operation of the discharge. Morse v. Hutchins, 102 Mass. 439. Opinion by SOULE, J.—*Turner v. Atwood.*

BREACH OF WARRANTY — PERSONAL PROPERTY—REAL ESTATE.—In suits to recover the price of personal property sold, it is well settled that a partial want or failure of the consideration, or a breach of the warranty of title or quality, may be shown in defense, in reduction of damages. But when the consideration consists of real estate conveyed by deed with covenants of title, the grantee, in the absence of fraud, can not show in defense of an action for the consideration a breach of the covenants of the deed, but he is remitted to his action upon the covenants. 2 Kent Com. 433, and cases cited. Opinion by MORTON, J.—*Bowley v. Holway.*

ABSTRACT OF DECISIONS OF THE ST. LOUIS COURT OF APPEALS.

[Filed May 21 & 28, 1878.]

HON. EDWARD A. LEWIS, Presiding Justice.
" ROBERT A. BAKEWELL, }
" CHAS. S. HAYDEN, } Associate Justices.

WHERE AN ATTORNEY IS RETAINED FOR A PARTICULAR CASE and does work, and is discharged without fault on his part, the only measure of damages is the price agreed to be paid. The nature of the engagement exempts the case from the rule by which the contract price, in ordinary cases of service, is made merely *prima facie* evidence. Affirmed. Opinion by HAYDEN, J.—*McElhinney v. Klein.*

TRUST DEED—TENDER.—1. A tender to discharge the lien of a mortgage must be a tender of the whole amount of the mortgage debt, not merely the amount due at the time of the tender. 2. Where a deed of trust provided that the principal note should become due if the interest was not paid, and the trustee foreclosed for non-payment of interest, and, in a proceeding to set aside the foreclosure, the court found that, before the foreclosure, the debtor had duly tendered the amount due and all costs, and entered a decree that the foreclosure should be set aside on payment within a certain time of the interest notes due and all expenses: *Held*, in a proceeding in ejectment by the purchaser at the foreclosure sale, that the decree setting aside the foreclosure was conditional; and that, as its terms had not been complied with, the finding of the court and the decree were no defense in the ejectment suit. Though that suit was between the same parties, and the decree in the former proceeding estopped the plaintiff in ejectment to deny that defendant had tendered the amount actually due at the time of the sale and all costs, yet that tender having been a tender of the amount then due merely because it cured the default caused by non-payment of interest, and having been subsequently withdrawn by neglect to comply with the terms of the decree, the right to redeem is gone, and the conditional decree operates as a

confirmation of the foreclosure and has the same effect as a dismissal of the bill to redeem. Affirmed. Opinion by BAKEWELL, J.—*Cupples v. Galligan et al.*

BILL OF LADING— DELIVERY — INDORSEMENT — INNOCENT PURCHASER.—1. The person who first gets a bill of lading out of a set of three, gets the property it represents, and need do nothing more to secure his title. It is a symbolical delivery, and has the effect of an actual delivery of the property, neither less nor more. 2. An indorsement of the bill of lading is not necessary to the symbolical delivery; the transfer, when intended to operate as a direct delivery of the goods, will do. Where the bill of lading is delivered indorsed to the order of the factors of the consignors accompanied with the drafts of the consignors upon their factors for the proceeds, this is a complete delivery of the goods, divests the title of the consignors, and vests it in the person to whom the bill of lading is delivered. 3. And it is not necessary, to pass title as against a subsequent innocent purchaser of the goods for value, that any advance or acceptance should have been expressly made upon the particular consignment. 4. A corporation of distillers had an agreement with a bank, that the bank should make advances for the business of the corporation, and that the whisky manufactured by the distillery corporation should be shipped on bills of lading to be delivered to the bank, together with drafts drawn by the corporation on their factors at St. Louis, where the whisky was to be sold. In accordance with this agreement, the bank advanced moneys which were expended in purchasing revenue stamps for a lot of whisky. The morning after this whiskey was shipped, the authorized secretary of the corporation delivered to the bank bills of lading for the whisky, and drafts on their factors for the proceeds. The president of the corporation, without the knowledge of the secretary or the bank, got one of the sets of bills of lading— the third bill of the set being in the hands of the carrier — and accompanied the whisky to St. Louis, where he sold and delivered one-half of the lot to C on the morning of his arrival, and about the hour that the bill of lading was delivered to the bank. On the next day he sold and delivered to C one-fourth more of the consignment, received the proceeds and absconded. C did not receive any bill of lading; the goods were delivered by the clerk of the boat on the written order of the absconding president, indorsed on the third bill of the set retained by the carrier. *Held*, in an action by the bank against C, the innocent purchaser, that the title had passed to the bank by the delivery of the bill of lading, and that the bank was entitled to recover. Reversed and remanded. Opinion by BAKEWELL, J.—*Skilling v. Ballman et al.*

QUERIES AND ANSWERS.

[In response to many requests from lawyers in all parts of the country, we have decided to commence again the publication of questions of law sent to us by subscribers. We propose to make this essentially a subscriber's department—*i. e.*, we shall depend, to a large extent, upon them to edit this column. Queries will be numbered consecutively during the year, and correspondents are requested to bear this in mind when sending answers.]

QUERIES.

35. LAND LAW — PATENTS.—Under provisions of Federal statutes, a guardian of a minor heir of a deceased soldier made an entry for certain lands in the name of and for the benefit of said minor heir. Subsequent to said entry, and prior to trial, proof being made for said land, said minor heir died—and subsequent to said death said guardian made final proof, reciting the death of said minor heir. 1st. In the name of whom should the patent to said land issue—should it be in the *name* of said *minor* direct, as though living; or should it be "to the heirs" of said minor (naming the minor)? 2d. What is the legal effect of the patent in name of a dead person? The Hon. Commissioner General Land Office thinks said patent should issue to the minor direct, and not to heirs as heirs of said minor. This inquiry is made in good faith, and not through levity, and if there is any old *dead* statute permitting patents to issue as indicated, we want to know it prior to our induction into office as H. C. G L. O. in 1880. "KANSAS."

36. SHERIFF—TERM OF OFFICE.—The old constitution provides that the sheriff can hold office for four years in eight; the new constitution provides that the sheriff can hold office four years out of six. Now if a sheriff holds his office four years under the old constitution, and the new one provides as above, can the sheriff be elected and hold his office, if contested? "MISSOURI."

ANSWER.

No. 31.

(6 Cent. L. J. 439.)

Section 14 of the garnishment act of the present R. S. of Illinois, is not repealed by the act of the same state, in force July 1st, 1877, for the exemption of personal property. The latter refers only to exemptions "from execution, writ of attachment, and distress for rent." The former has reference to exemptions "from garnishments"; and a garnishment proceeding is not in the nature of an execution, a writ of attachment or distress for rent. Moreover, the $25 exemption under the garnishment act is not included in or covered by any provision of the act in force July 1st, 1877, above referred to; but is a separate and additional right conferred upon the debtor. A defendant, coming within the purview of the two acts would be entitled to the benefit of each. Fanning v. 1st Nat. Bank of Jacksonville, 76 Ill. 53. J. N. S

BOOK NOTICE.

NATIONAL BANK CASES, containing all Decisions of both the Federal and State Courts relating to National Banks, with Notes and References. By ISAAC GRANT THOMPSON, Editor of the *Albany Law Journal* and of the American Reports. 1864-1878. Albany: John D. Parsons, Jr. 1878.

It has required a volume of over 900 pages to contain the decisions of the federal and state courts relating to national banks. The fact that the cases on this subject have already become so numerous sufficiently justifies the publisher in his undertaking, and will commend the volume before us to the profession. Mr. Thompson is well known as an editor; that his reputation in this department will not be injured by the publication of his latest work, we are, from an examination which we have made of it, very confident. His notes are accurate and full.

The value of such a work as this is readily seen. Among the subjects discussed and adjudicated in the cases here contained are the following: The taxation of national banks, including the law as to deductions for real estate, debts, etc.; the taxation of surplus, of circulation and of real and personal property; actions

by and against national banks; duties and liabilities of officers of national banks, including the question as to the jurisdiction of state courts of prosecutions and indictments of bank officers and agents; bonds of bank officers and the liability of sureties; the law relating to loans and discounts by national banks; the right of national banks to take mortgages on real estate, also, their right to take mortgages on personal property; the right of national banks to buy bills and notes, also, to take deposits for safe-keeping and their liability in regard thereto; usury, and actions against for penalties for exacting unlawful interest; loans and discounts; liens on stock; attachments against; purchase and sale of real estate: transfers of shares; liability of stockholders; removal of actions by and against to federal courts; embezzlement and larceny by officers and agents; liabilities as depositaries of public moneys; insolvency of; winding up; receivers of; examination of, by revenue officers; and many other subjects which have been adjudicated in either the federal or state courts. These cases are scattered through many volumes of reports or law periodicals, but are here brought together in one collection.

NOTES.

ONE of our contributing editors writes:—It is certainly a pity that our legal quill-drivers can not learn to stick to their texts, when by doing so they would avoid showing their weak points. I had taken up a postal card to order a book written by a Mr. Wells, on the subject of the separate property of married women, when my eye fell upon the preface which is sent out as an advertisement of the work, in which I found twenty-one lines from Tennyson; a eulogy on "The Celebrated Mrs. Gaines," *videlicet*, Myra Clark, I suppose; the opinion held by the author concerning Holy Writ; some reference to the customs of the East, which, by the way, are grossly misrepresented; the notion of the author as to the causes of the amelioration of the condition of women, which, even as great a dogmatist as Guizot could have told the writer, was a mistake; the judgment of the author upon the marital relation, and a curse on all divorce lawyers; winding up with a request to "all true men and all true patriots" to "engrave" the aforesaid lines of Tennyson on their hearts. I suppose that by this recommendation to "engrave," the author means to advise us to get by heart. Getting twenty-one lines of poetry by heart may be a very good exercise, but it is not every body that wishes to begin a law book in that way. As I am not now in the engraving business, I concluded not to buy a book which needed to be read after a certain preparation of the mind, which I should probably not make. As a member of the legal profession, I have learned to dislike multifariousness; and more even than my admiration of "the Celebrated Mrs. Gaines," deeper than my detestation of oriental darkness, more unqualified than my horror of divorce lawyers is my respect for the memory of the boarder who requested his landlady to have the butter and the hair brought in on separate plates, so that he could mix them to suit himself.

The *Solicitors' Journal* observes that when the relations between railway companies and the public come to be considered in Parliament as a whole—as sooner or later they will be—it is to be hoped that the question of the powers of the companies to make by-laws will not be overlooked. The recent case of Bentham v. Hoyle, 26 W. R. 314; L. R. 3. Q. B. D. 289, curiously illustrates the present difficulties in the matter of by-laws. It is common enough for offenders to be brought up in the police courts for being guilty of the dishonest trick of eluding payment of fare. But it is plain that in the hurry of railway traveling many persons of undoubted respectability must frequently find themselves in a railway carriage without a ticket, and such persons are in this predicament. The act of Parliament which applies to their case (the Railway Clauses Consolidation Act, 8 Vict. c. 20) provides the penalty of 40s. in the case of *an intent to avoid payment of fare*. The by-laws of the companies provide the same and a further penalty, but do not make the fraudulent intention so much an element of the offense. In numerous cases, of which Dearden v. Townsend, L. R. 1 Q. B. 10, is the best known, the meaning of such a by-law has been considered. Dicta are conflicting, but both Dearden v. Townsend and Bentham v. Hoyle seem to be express decisions that without fraud there is no punishable offense at all. By section 103 of the Railway Clauses Act, 1845, "if any person travel * * * without having previously paid his fare and with intent to avoid payment thereof, * * * every such person shall, for every such offense, forfeit to the company a sum not exceeding forty shillings." By sections 108 and 109, read together with 3 & 4 Vict. c. 97, ss. 8, 9, all railway companies may make by-laws for regulating traveling upon their railways, which by-laws must be submited to the Board of Trade before confirmation, before they have any force, and must not—this latter provision is, of course, in affirmance of the common law—"be repugnant to the laws of that part of the United Kingdom where the same are to have effect." "Any person," it is added, "offending against any such by-law shall forfeit for every such offense any sum not exceeding five pounds, to be imposed by the company in such by-law as a penalty for every such offense." It remains to state the by-law. It runs thus:

"Any person traveling without the special permission of some duly authorized servant of the company, in a carriage or by a train of a superior class to that for which his ticket was issued, is hereby subject to a penalty not exceeding forty shillings, and shall, in addition, be liable to pay his fare according to the class of carriage in which he is traveling from the station where the train originally started, unless he shows that he had no intention to defraud."

The facts were simply that Mr. Bentham was convicted in a penalty of 10s. under this bye-law for traveling in a first-class carriage with a second-class ticket, but it was found as a fact that he had no intention to defraud, The judgment of the court (Cockburn, C. J., and Manisty, J.), was that the conviction must be quashed. The Lord Chief Justice—who happened to have been a member of the court which decided Dearden v. Townsend—said that the words, "unless he shows that he has no intention to defraud," might, in point of grammar, apply either to the whole of the by-law, or only to the latter part of it, which imposes the obligation to pay "whole fare." If they applied to the whole, the conviction was clearly bad on the construction of the by-law itself, inasmuch as absence of fraud had been found as a fact. On the other hand—as the learned judge inclined to think—the words applied to the latter part of the by-laws only, the by-law was unreasonable, chiefly on the ground that "there must be, in point of reason a *mens rea* to warrant charging people with offenses and convicting them on such charges, in addition to the offenses under the Act of Parliament." Mr. Justice Manisty, though not having the doubt as to the construction thought it "beyond all doubt unreasonable."